BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 99-25
Creation of a Low Power Radio Service	)	

To: The Commission

JOINT COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

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Summary

In assessing the need to modify its framework for the regulation of low-power FM radio ("LPFM") licensees, the Commission should remain true to the principles established in the 2000 *LPFM Order*, and ensure that LPFM stations provide secondary, supplementary service to the public without disrupting preferable full-power operations. The State Associations urge the Commission to refrain from modifying the existing LPFM framework as (i) there is no demonstrable public interest need for such modification; and (ii) such modification cannot be accomplished without harming full-power broadcast station operations and the public interest.

Given the nascent nature of the LPFM service, there is simply no reasonable basis for changing the existing rules. Nothing in the operational history of the LPFM service supports a finding that existing rules are inadequate. The few commenters supporting the proposed changes provide no justification for upsetting the careful balance established by the Commission in 2000. The "harms" alleged by these parties are both woefully underspecified and nothing more than the natural consequence of the intended, secondary status of LPFM stations. While the secondary status of the LPFM service may adversely affect some *LPFM licensees*, it does not follow that such status has any adverse effect on the *public interest*.

On the other hand, the record overwhelmingly demonstrates that modifying the LPFM framework to make LPFM stations "co-primary" with full-power stations, or "primary" to FM translators, would result in massive interference to full-power stations and their associated translators, thereby harming the public interest and precluding members of the listening public – particularly in areas that are already underserved – from realizing the full benefits of full-power local broadcast services. Accordingly, the State Associations strongly urge the Commission to hold this proceeding in abeyance, without modifying its LPFM service regulations.

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Okalahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico,

Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, and Wisconsin Broadcasters Association (collectively, the "State Associations"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly submit these reply comments in the above-captioned proceeding.[1]

Introduction

The State Associations fully support the Commission's efforts to create "an improved LPFM service, while maintaining the integrity of the FM service."[2] However, as the State Associations demonstrated in their Comments, there is simply no reasonable basis for changing the LPFM rules given the lack of any significant operational history or evidentiary record upon which such changes might be based. This is particularly true where, as here, many of the proposed changes would compromise the operations of full-power FM broadcast stations and their associated FM translators, as overwhelmingly evidenced by the comments in this proceeding.

The few commenters that have supported the proposed modifications of the LPFM framework have failed to justify those changes. Specifically, these commenters have failed to demonstrate (i) that the public interest, on the whole, is being disserved under the existing framework, and (ii) that the alleged, speculative benefits of the proposed modifications justify

[1] *Creation of a Low Power Radio Service*, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 99-25, FCC 05-75 (Mar. 17, 2005) ("*FNPRM*").

[2] *Id.* at ¶ 1.

the definite, severe harms that such modifications would cause to the ability of full-power broadcasters to serve their local communities and the larger public interest.

When the Commission first authorized the LPFM service, it emphasized its dual determinations to preserve the "technical excellence of existing FM radio service, and not to impede its transition to a digital future."[3] The Commission should continue to follow these foundational, guiding principles. Simply put, there is no evidence to suggest that the Commission should alter the framework established in the 2000 *LPFM Order*, which successfully balanced the *need* of primary, full-power service against the *desire* for secondary LPFM service where possible.[4] Accordingly, the State Associations urge the Commission to take no further action in this proceeding.

I. THE COMMISSION'S ACTIONS IN THIS PROCEEDING SHOULD BE GUIDED BY THE FOUNDATIONAL PRINCIPLES ADOPTED BY THE COMMISSION IN THE 2000 *LPFM ORDER*

In creating the LPFM service, the Commission clearly intended that LPFM stations would provide secondary, supplementary service to the public. The Commission was careful to specify that LPFM operations would not be permitted to displace inherently superior full-power operations. Accordingly, LPFM was established with the understanding that LPFM operations would not "compromise the integrity of the FM spectrum" or "cause unacceptable interference to existing radio service."[5] The Commission determined to "authorize low power radio stations

[3] *Creation of a Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 at ¶ 2 (2000) ("*LPFM Order*").

[4] *Id.* at ¶ 62 (balancing the Commission's "vital interest in maintaining the technical integrity of existing radio services" against its mere "desire" to create and foster LPFM).

[5] *Id.*

throughout the FM band, *where the stations will fit*," while fully acknowledging that "FM band crowding may preclude or limit LPFM opportunities in certain markets[.]"[6]

The State Associations strongly believe that, in assessing the need to modify the LPFM framework, the Commission should remain true to its foundational principles, and ensure that LPFM stations provide secondary, supplementary service to the public without disrupting preferable full-power operations. Moreover, as any modification of the LPFM framework could potentially compromise full-power operations, the Commission should not adopt any such modification without clear evidence that there is a demonstrable need to risk even the potential for harm. Thus, the State Associations urge the Commission to refrain from modifying the existing LPFM framework as (i) there is no demonstrable public interest need for such modification; and (ii) such modification cannot be accomplished without harming full-power broadcast station operations which serve the public interest.

II. THERE IS NO DEMONSTRABLE NEED TO MODIFY THE EXISTING LPFM FRAMEWORK

A. The Brief Operational History of the LPFM Service Provides No Reasonable basis for Modifying the Existing LPFM Framework

The LPFM service has been in existence for roughly five years, during which time only about 590 LPFM stations – representing about 18% of all applications filed – have become operational. In short, the LPFM service is still in its infancy, and the Commission has barely begun to license LPFM stations under the existing framework established in 2000. Given the nascent nature of the LPFM service, there is simply no reasonable basis for changing the existing rules. Nothing in the operational history of the LPFM service supports a finding that existing rules are inadequate. If anything, the limited evidence that does exist strongly suggests that the

[6] *Id.* at ¶ 58 (emphasis added).

Commission's 2000 rules struck the correct balance between protecting full-power operations and promoting the new LPFM service "where possible."

B. The Comments Fail to Demonstrate that the Existing LPFM Framework is Harming the Public Interest

The few commenters supporting the proposed changes to the LPFM framework provide no justification for upsetting the careful balance established by the Commission in 2000. These commenters fail to cite any specific, tangible harms to the public interest caused by the existing LPFM framework. Rather, these commenters rest on broad allegations that the LPFM service is "harmed" by the "encroachment" of full-power operations.[7] These "harms," however, are woefully underspecified; Prometheus, for example, does not cite a single specific example of such "encroachment."

Moreover, these "harms" are nothing more than the natural consequence of the intended, secondary status of LPFM stations. While the secondary status of the LPFM service may adversely affect some *LPFM licensees*, it does not follow that such status has any adverse effect on the *public interest*. The few commenters supporting the proposed modifications conflate these two distinct issues, and in doing so unjustifiably subordinate the interests of the public to those of LPFM licensees. In truth, any limitations experienced by some LPFM stations are necessary to facilitate the significantly greater benefits that the public accrues from continuing, viable full-power service. Moreover, as the Commission itself has noted, only one LPFM station has been compelled to cease operations during this time, notwithstanding the "secondary" status of the service.[8]

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[7] *See* Comments of Prometheus Radio Project, et al. at 13 ("Prometheus Comments").

[8] *FNPRM* at ¶ 38.

III. THE PROPOSED MODIFICATIONS TO THE LPFM FRAMEWORK WOULD SUBSTANTIALLY HARM FULL-POWER OPERATIONS AND THE PUBLIC INTEREST

A. Full-Power Stations Provide Critical Service to Local Communities

The record in the Commission's *Broadcast Localism* proceeding well evidences the prodigious efforts by the free, over-the-air, locally-based, full-service broadcast industry to meet the needs, issues, and problems of America's local communities.[9] There can be no serious dispute that broadcasters do an exemplary job of serving the public interest. For this reason, the Commission has sought to protect full-power broadcast operations from harmful interference, and has generally recognized the "primary" status of full-power operations, given the "primary" role that these operations have played in serving the public interest.

This track record has not been meaningfully contested in this proceeding. While some commenters, most notably Prometheus, make sweeping and unsupported claims that full-power licensees are failing to serve the public, these claims are entirely unsubstantiated, as is the insinuation that the LPFM service was established primarily because full-power stations were failing their public service obligations. In fact, the LPFM service was created only after the Commission recognized the exemplary service delivered by full-power broadcasters to their communities. In doing so, the Commission intended to replicate this service on a smaller scale, "where possible," and without diminishing full-power service, through the LPFM service.

B. The Record Overwhelmingly Demonstrates that Modifying the LPFM Framework Would Substantially Harm Full-Power Operations, and, by Extension, the Public Interest

The comments overwhelmingly demonstrate that modifying the existing LPFM rules by making LPFM stations "primary" would result in significant interference to full-power

[9] *See, e.g.,* Comments of the Named State Broadcasters Associations, *Broadcast Localism*, MB Docket No. 04-233, FCC 04-129 (Nov. 1, 2004).

operations, thereby precluding members of the listening public from realizing the full benefits of full-power local broadcast services. Both commercial and noncommercial broadcasters have demonstrated that LPFM operations have the potential to cause massive interference to full-power service.[10] As noted previously by the State Associations, LPFM stations are capable of generating interference areas that are 1000% to 2000% larger than the small areas served; the LPFM service is far less efficient use of spectrum than the full-power FM service.[11]

The strong likelihood of harm to full-power stations is virtually uncontested by the few commenters that have supported the proposed modifications of the LPFM framework. Rather, these commenters merely argue, without analysis or justification, that such harm is acceptable.[12] Accordingly, the Commission should assume that full-power stations, and the local communities that rely on those stations, would be harmed by the adoption of the proposed modifications. That being the case, the proposed modifications of the LPFM framework would be fundamentally inconsistent with the Commission's guiding principles in establishing the LPFM service.

This interference would not be offset by sufficient benefits to the public. The limited benefits that might be derived from the LPFM service are still largely speculative, while the service provided by full-power stations is a reality. Moreover, as noted by NTA and RTN,

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[10] *See, e.g.,* Comments of the National Association of Broadcasters ("NAB Comments"); Comments of the National Translator Association ("NTA Comments") (describing likely adverse effects of "co-primary" LPFM operations on commercial full-power service). *See also, e.g.,* Comments of National Public Radio; Comments of Educational Media Foundation, Comments of the Station Resource Group (describing likely adverse effects of "co-primary" LPFM operations on commercial full-power service).

[11] *See Amendment of Sections 74.1204(a) and 73.807 of the Commission's Rules*, Petition for Rulemaking, RM-11099, at 24-24 and Exhibit 6 (filed by the New Jersey Broadcasters Association on May 27, 2004).

[12] *See* Prometheus Comments at 8-12. Although Prometheus spends five pages discussing why it believes that the adoption of a contour overlap methodology would be good public policy, Prometheus never claims or demonstrates that the methodology would ensure that full-power stations are not harmed.

LPFM stations are not subject to the same explicit localism obligations as full-power stations.[13] At the most fundamental level, though, LPFM stations simply lack the ability, resources, and incentives to serve the local community to nearly the extent as full-power stations.[14] Given the much wider scope of the services provided by full-power stations – both in terms of geography and cross-sectional appeal – constraining full-power operations to promote LPFM operations would necessarily result in a net reduction in public interest benefits. Simply put, there is no instance in which the replacement of a full-power station by an LPFM station would serve the public interest.

C. The Commission Should Reject the Proposed Modifications

1. The Commission should not confer "co-primary" status on LPFM stations, or adopt any "processing guideline" that would effectively confer such status on LPFM stations

In the *FNPRM*, the Commission correctly rejected any notion that the LPFM service be made "co-primary" with full-power operations as contrary to the spirit and intent of the 2000 *LPFM Order*, and contrary to the public interest.[15] Notwithstanding, Prometheus urges the Commission to transform the LPFM service in precisely this fashion. In doing so, Prometheus rests almost entirely on its claim that under *status quo* conditions full-power stations "conjure up" engineering changes for the purpose of forcing LPFM stations off the air.[16]

This accusation, however, is unsupported by any actual evidence. In truth, full-power stations have not engaged in vindictive actions to frustrate LPFM operations. Full-power

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[13] *See* NTA Comments at 3-4; Comments of the Radio Training Network, Inc. at 7 ("RTN Comments").

[14] Further, as NTA notes, the economic viability of the LPFM service is still in doubt. LPFM licensees must be non-profit organizations, and must rely on extremely small geographic areas and listener bases to raise adequate funds to operate. *See* NTA Comments at 3.

[15] *LPFM Order* at ¶ 38.

[16] Prometheus Comments at 12.

stations have, however, relied on the "primary" status granted by the Commission decades ago, and confirmed by the Commission in the 2000 *LPFM Order*, to ensure that the public receives quality full-power service. As intended by the Commission, this arrangement has ensured that full-power stations have continued to operate without harmful interference, providing quality programming to local communities in the process. Full-power broadcasters should not be expected to apologize for serving the public interest, even if that service has inconvenienced some LPFM licensees. The Commission should not make LPFM licensees "co-primary;" doing so would be contrary to the Commission's intent in establishing the LPFM service, and would undermine the integrity of full-power operations.

Similarly, the Commission should not adopt any "processing guideline" presuming that any full-power application that might limit LPFM operations would be contrary to the public interest. As recognized by the Commission, the suggested "processing guideline" would be the equivalent of conferring primary status on the LPFM service, and would cause the same harms. Accordingly, the Commission should affirm its tentative conclusions that making LPFM "co-primary," whether directly or indirectly, would not serve the public interest.

2. The Commission Should Not Eliminate or Modify the Second and Third-Adjacent Channel Protections Mandated by Section 73.809

a. The Commission lacks the authority to eliminate or modify Section 73.809 protections

As the NAB, NPR, and most importantly the Commission itself have noted, the Commission lacks the authority to eliminate interference protections for full-power stations operating on channels second- and third-adjacent to LPFM stations.[17] The 2001 D.C. Appropriations Act explicitly provides that the "Commission shall modify the rules authorizing

[17] NAB Comments at 5-8; NPR Comments at 14-18.

the operation of low-power FM stations … to prescribe the minimum distance separation for third-adjacent channels (as well as for co-channels and first- and second-adjacent channels)."[18] Further, the Act provides that the "Commission may not eliminate or reduce the minimum distance separations for third-adjacent channels … except as expressly authorized by an Act of Congress[.]"[19] Thus, the Commission clearly lacks the authority to unilaterally relax the minimum distance separation requirements implemented by the Commission in Section 73.809.

The interpretation suggested by Prometheus is, quite simply, illogical and incredible. While the Commission may have discretion to interpret ambiguous statutory language, the Commission does not have authority to countermand clear Congressional directives.[20] Thus, the Commission lacks the authority to adopt "additional or more accurate interference valuation methods," such as the contour overlap methodology, where such adoption would fundamentally undermine Congressional intent. Prometheus's claim that the Commission has authority to supplant the statutory minimum distance separation requirements because Congress directed the Commission to study the potential effects of eliminating those requirements is equally unavailing. If anything, the fact that Congress directed the Commission to study these effects and report its findings to Congress gives rise to the negative implication that Congress did not wish to give greater authority to the Commission.

b. Second- and third-adjacent channel protections are necessary to preserve the integrity of full-power operations

Even if the Commission did have the authority to eliminate second- and third-adjacent channel protections, the elimination of these protections would unjustifiably harm the public

[18] 2001 D.C. Appropriations Act, Pub. L. No. 106-553, §632(a)(1)(A).

[19] *Id.* at §632(a)(2)(A).

[20] *See, gen., Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

interest. As numerous commenters have shown, without these protections, LPFM operations would cause massive interference to full-power operations.[21] Moreover, without adequate spacing, full-power operations would cause massive interference to LPFM operations, seriously limiting the already speculative benefits claimed by LPFM operators. Minimum distance separation is critical to avoiding these harms.

Some LPFM advocates have claimed that the minimum distance separation methodology yields results that are too risk-averse. Given the stakes, however, some degree of risk-aversion is simply good public policy. While no methodology is perfect, the minimum distance separation methodology does the best job of balancing the benefits of LPFM service against the potentially devastating effects that LPFM operations could have on full-power service.

Tellingly, none of the few commenters supporting the proposed modifications of the LPFM framework have demonstrated that the elimination of second and third-adjacent channel protections would not harm full-power operations. These commenters utterly fail to demonstrate how the Commission could possibly make the LPFM service co-primary while maintaining the integrity of full-power operations. Accordingly, the Commission cannot and should not adopt the proposed modification to the LPFM framework, as doing so would necessarily run afoul of the foundational principles adopted by the Commission in establishing the LPFM service.

IV. THE PROPOSED MODIFICATIONS TO THE LPFM FRAMEWORK WOULD SUBSTANTIALLY HARM FM TRANSLATOR OPERATIONS AND THE PUBLIC INTEREST

A. FM Translators Provide Critical Service to Local Communities

As noted previously by the State Associations, FM translators play a critical role in facilitating service to the listening public. Translators allow FM licensees to fulfill their public

[21] *See, e.g.,* NAB Comments; NPR Comments.

interest mandate by ensuring that full-power stations are able to reach all geographic segments of their local communities. FM translators allow licensees to provide service to "areas in which direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstructions."[22] Numerous commenters have described, in detail, the ways in which FM translators facilitate service across unusual terrain and to areas of the country that would otherwise be underserved.[23]

Translator service is, by and large, local service, in the same manner that full-power programming is local service. For this reason, the Commission has sought to protect FM translators from harmful interference. In establishing the LPFM service, the Commission required LPFM stations to protect both existing and new FM translator stations from harmful interference. This condition has ensured that the public has access to the programming of full-power stations, while facilitating the benefits of LPFM operations where possible.[24]

B. The Record Overwhelmingly Demonstrates that Modifying the LPFM Framework Would Substantially Harm Full-Power Translator Operations, and, by Extension, the Public Interest

In the *FNPRM*, the Commission suggests modifying the "co-primary" status of LPFM and FM translator licensees to confer "primary" status on the former at the expense of the latter. In response, a large, diverse array of commenters, including both commercial and non-commercial broadcasters, have described the substantial harms that would flow directly from this

[22] *See Amendment of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212 at ¶ 48 (1990).

[23] *See, e.g.,* Comments of NRC Broadcasting; Comments of Progressive Broadcasting System and Christian Friends Broadcasting; Comments of WFCR(FM); Comments of MBC Grand Broadcasting; Comments of Temple University.

[24] *LPFM Order* at ¶¶ 62-67.

change in the LPFM framework.[25] In particular, these commenters have noted that subordinating FM translator operations in this fashion would result in seriously degraded service to many local communities – particularly those communities that are already underserved or disadvantaged.

In contrast, the record contains no serious attempt to justify "primary" status for LPFM licensees. The most extensive discussion, offered by Prometheus, does not even appear in the body of Prometheus' comments; instead, Prometheus exiles its translator proposals to separate appendices, and does not analyze or justify these proposals in any detail. Prometheus relies solely on sweeping assertions of the "harms" caused by translators to LPFM stations, but fails to document any such "harms." More importantly, Prometheus makes no showing that the adoption of its proposals would serve the public interest.

C. The Commission Should Reject Any Requirement that FM Translators Rebroadcast a Minimum Amount of "Locally Originated" Programming to Qualify for "Primary" Status

Prometheus further suggests that the Commission should only confer "primary" status on FM translators that rebroadcast 8 hours or more of "locally originated" programming per day. Since FM translators may not originate local programming, and are only permitted to rebroadcast the programming of full-power stations, this proposal is a fairly naked attempt to indirectly impose programming quotas on full-power stations. That being the case, the State Associations suggest that this matter is best addressed in the context of the *Broadcast Localism* proceeding. To the extent that the Commission does consider Prometheus's proposals in the context of this

[25] *See, e.g.,* NAB Comments; Comments of Cox Broadcasting; Comments of Saga Communications; NTA Comments (describing likely adverse effects of "primary" LPFM operations on commercial FM translator service). *See also, e.g.,* NPR Comments; EMF Comments; Comments of Temple University; RTN Comments (describing likely adverse effects of "primary" LPFM operations on non-commercial FM translator service).

proceeding, the State Associations hereby incorporate by reference their comments in that proceeding.[26]

Critically, though, the State Associations wish to emphasize that the imposition of programming quotas or minimums as a prerequisite to "primary" status would raise significant First Amendment considerations which the Commission cannot ignore.[27] For decades, the Commission has wisely eschewed any focus on a quantitative clock measure of performance in content-sensitive areas, recognizing that a "one-size-fits-all" approach is by definition no approach at all, and that quantity neither connotes quality nor actual responsiveness. While the Commission does have a legitimate interest in ensuring that stations operate in the public interest, the First Amendment dictates that the Commission adopt the least restrictive means of achieving this goal.[28] As the Commission has previously noted, rigid, formalized programming requirements tend to harm, rather than help local broadcasters in fulfilling their public interest obligations, and as such rarely qualify.[29] In particular, the quota for "locally originated" programming suggested by Prometheus entirely fails to ensure that the programming produced will actually be responsive to local needs. Accordingly, such a quota would not be the least

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[26] *See* Comments of the Named State Broadcasters Associations, *Broadcast Localism*, MB Docket No. 04-233, FCC 04-129 (Nov. 1, 2004).

[27] *See, gen., Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television* Stations, 98 F.C.C.2d 1075 at ¶¶ 27-29 (1984). *See also CBS v. FCC*, 412 U.S. 914 (1973); *MPAA v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002); *Accuracy in Media v. FCC*, 521 F.2d 288, 296-97 (D.C. Cir. 1975) (finding that any use of the Communications Act to create "a more active role by the FCC in the oversight of programming … [would] threaten to upset the constitutional balance.").

[28] *U.S. v. O'Brien*, 319 U.S. 367, 377 (1968) (imposing an affirmative obligation on the government to examine whether less-restrictive alternatives are available to achieve policy goals); *HBO v. FCC*, 567 F.2d 9, 48 (D.C. Cir. 1977) (incidental restrictions on First Amendment freedoms must be no greater than is essential to further a compelling state interest).

[29] *See, e.g., Deregulation of Radio*, 84 F.C.C.2d 968 at ¶ 39 (1981).

restrictive means of ensuring that the public interest is served by FM translator licensees, and would not pass First Amendment scrutiny.

Conclusion

Based on the foregoing, the State Associations strongly urge the Commission to hold this proceeding in abeyance, without modifying its LPFM service regulations, until the LPFM service has experienced a sufficiently long and broad operational track record.

Respectfully submitted,

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